wrong, in such a case, is not lessened, but public policy and justice demand that as long as damages at common law are not apportioned as in the admiralty courts, no one himself causing or responsible for another's causing, his own injury, shall shift the burden of it even upon a party who cannot deny having been in the wrong. The facts of the principal case do not bring it within this rule. The plaintiff was not responsible for his bailee's acts; he could not have been held liable to one whom the latter negligently injured while driving the mule. On principle, therefore, recovery should have been allowed, as the plaintiff was without fault and had been injured by a wrongful act of the defendant, — the fact that another had been equally in the wrong with the defendant furnishing the latter with no excuse.

There are few decisions in point. In one line of cases where a shipper's goods, in the possession of a carrier, have been injured by the concurring negligence of the carrier and a third person, the shipper has been denied an action against the latter. *Arctic Fire Ins. Co.* v. *Austin*, 69 N. Y. 472. These cases are supportable only on the questionable ground that since the carrier is an absolute insurer, public policy should inflict on him the consequences of any loss. It is clear that these decisions, whether sound or not, do not govern the principal case. Two early American decisions, wherein the point received no consideration, support the case under discussion. On the other hand, the New Jersey court, in an able opinion, has recently denied the doctrine of imputed negligence under similar circumstances. *New York, etc. R. R. Co.* v. *New Jersey, etc. R. R. Co.*, 60 N. J. Law, 338. Further, the analogous cases which allow one injured in a hired carriage by the concurrent negligence of the driver and a third person to bring action against either party, point to the same result. *Randolph* v. *O'Riordan*, 155 Mass. 221. Such scant authority as can be mustered to the support of the principal case, coming, as it does, from a time when the doctrine of imputed negligence was much befogged, and being contrary to principle, would seem, therefore, to afford no justification for the decision.

Discharge of Jury on Failure to agree. — The question has recently been raised in an Illinois case as to whether the discharge of a jury by the court without the prisoner's consent, because of its inability to reach a verdict, is a bar to a second trial on the ground of former jeopardy. *People ex rel. Dreyer* v. *Magerstadt*, Circuit Ct., Cook Co., Ill., National Corporation Reporter, April 19, 1900. The court, after an exhaustive review of the authorities, concluded that the state constitution, which declared that no person shall be twice put in jeopardy for the same offence, had not been violated by a second trial of the accused.

There is no doubt that this decision is in accord with the almost universal current of opinion both in England and in the United States, though the contrary view prevails in five or six states. *Com.* v. *Fitzpatrick*, 121 Pa. 109. Nevertheless the general rule is the more modern, and on theory not free from objections. In the first place, it cannot be denied that the accused in such cases as the present has been put in jeopardy by the first trial. There was no defect in the indictment or in the proceedings — nothing to prevent a valid conviction had the jurors agreed. The defendant left his case with them, and would seem to be entitled to a verdict from their mouths. The situation is clearly different from that

where physical obstacles prevent a verdict, for in such cases it may be said there was no real jeopardy, since the trial could not proceed to the stage where the jurors should give their verdict. Moreover, historical considerations further raise in this country certain constitutional objections. The old common law view was that the jury could not be discharged "except in cases of evident necessity," 4 Bl. Com. 360, meaning thereby physical necessity, such as the death or severe illness of a person necessary to the trial. Mere inability to agree was never a good ground for discharge. The jury were to be kept without meat, drink, or fire until they should reach a verdict; and if the jury were discharged because they disagreed the accused could not be tried again. *Conway and Lynch* v. *The Queen*, L. R. 9 Ir. 149. Such was the view held at the time of the adoption of the Federal Constitution and of the constitutions of the earlier states. Hence where those constitutions provide against double jeopardy, it would seem unconstitutional to hold that the accused could be retried. This was the reasoning of *Com.* v. *Cook*, 6 S. & R. 576.

It has, however, been almost universally agreed that convenience and public policy must outweigh these technical objections, and that the prisoner may be tried again. In England the rule was so settled in 1866, *Winsor* v. *The Queen*, L. R. 1 Q. B. 289; the United States Supreme Court early adopted this view, *United States* v. *Perez*, 9 Wheat. 579; and most of the state courts have followed suit. *People* v. *Greene*, 13 Wend. 55; *Com.* v. *Purchase*, 19 Mass. 521. This result is also beneficial from the defendant's point of view, for where a verdict is compelled through physical pressure it is as likely to result unadvisedly against the prisoner as in his favor. It is much better to have a system in which the unanimity of the jury shall, as is said in *Winsor* v. *The Queen*, *supra*, be the result of nothing but the unanimity of conviction, and in which, when that cannot be, a new trial may be had.

RECENT CASES.

AGENCY — FRAUDULENT WAREHOUSE RECEIPT — ESTOPPEL. — The defendant's agent fraudulently issued a warehouse receipt for grain which he had not received. The receipt was transferred to the plaintiff for value without notice. *Held*, that the defendant is estopped from denying its validity. *Fletcher* v. *Great Western Elevator Co.*, 82 N. W. Rep. 184 (S. D.).

By the great weight of authority the holder of such a receipt cannot recover in any form of action. *Grant* v. *Norway*, 10 C. B. 665; *Pollard* v. *Vinton*, 105 U. S. 7; *National Bank of Commerce* v. *Chicago, etc. R. R. Co.*, 44 Minn. 224. Some cases, however, in accord with the principal case, hold that, on account of the commercial use made of bills of lading and warehouse receipts, they are in effect representations to subsequent holders that the goods have been received, and so contract will lie. *Armour* v. *Michigan Central R. R. Co.*, 65 N. Y. 111; *Sioux City, etc. Ry. Co.* v. *First Nat. Bank*, 10 Neb. 556. But, even granting that they are such representations, it seems that the proper remedy would be in tort for the fraudulent misrepresentation, instead of on the contract by estoppel, for the subsequent holder is only an assignee of the original fraudulent holder, and is, therefore, bound by defences to an action of contract good against him. Moreover, in this case, the act of the agent is clearly without the scope of his authority, and, accordingly, the defendant can in no sense be said to have made a representation.

AGENCY — LIABILITY OF PRINCIPAL — LUMPING OF ORDERS BY AGENT. — A broker, having received orders from two separate customers for shares of a certain